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*Attorney for Plaintiff,  
Mark Aussieker*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

**Mark Aussieker, Individually and on  
behalf of others similarly situated,**

Plaintiff,

v.

**NEXA Mortgage, LLC,**

Defendant.

**Case No.:**

**CLASS ACTION**

**COMPLAINT FOR VIOLATIONS OF THE  
TELEPHONE CONSUMER PROTECTION  
ACT 47 U.S.C. §227 ET SEQ.**

**JURY TRIAL DEMANDED**

**INTRODUCTION**

Plaintiff Mark Aussieker (“Plaintiff”) brings this action against Defendant NEXA Mortgage, LLC (“Defendant”) to secure redress for violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

**NATURE OF THE ACTION**

1. This is a putative class action pursuant to the TCPA, 47 U.S.C. § 227 et seq., (the “TCPA”).

2. Defendant operates as a full-service mortgage company. To promote its services, Defendant engages in unsolicited marketing, harming thousands of consumers in the process.

1           3. Through this action, Plaintiff seeks injunctive relief to halt Defendant's  
2 illegal conduct, which has resulted in the invasion of privacy, harassment,  
3 aggravation, and disruption of the daily life of thousands of individuals. Plaintiff also  
4 seeks statutory damages on behalf of himself and members of the Class, and any  
5 other available legal or equitable remedies.

6                                   **JURISDICTION AND VENUE**

7           4. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiff alleges  
8 violations of a federal statute. Moreover, jurisdiction is proper under 28 U.S.C. §  
9 1332(d)(2) because Plaintiff alleges a national class, which will result in at least one  
10 class member belonging to a different state than that of Defendant. Plaintiff seeks up  
11 to \$1,500.00 (one-thousand-five-hundred dollars) in damages for each call that is in  
12 violation of the TCPA, which, when aggregated among a proposed class numbering  
13 in the tens of thousands, or more, exceeds the \$5,000,000.00 (five-million dollars)  
14 threshold for federal court jurisdiction under the Class Action Fairness Act  
15 ("CAFA"). Therefore, both the elements of diversity jurisdiction and CAFA  
16 jurisdiction are present.

17           5. Jurisdiction is also proper because there exists a federal question based  
18 on the fact that Plaintiff's claims arise from the Telephone Consumer Protection Act,  
19 47 U.S.C. § 227 et seq. ("TCPA"), a federal statute.

20           6. Venue is proper in the United States District Court for the Eastern  
21 District of California pursuant to 28 U.S.C. § 1391(b)(2) and (c) because Defendant  
22 is deemed to reside in any judicial district in which it is subject to the court's personal  
23 jurisdiction, and because Defendant provides and markets its services within the  
24 district, thereby establishing sufficient contacts to subject it to personal jurisdiction.  
25 Further, Defendant's conduct against Plaintiff occurred within the State of California  
26 where Plaintiff resides, subjecting Defendant to the State of California.

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28 //

**PARTIES**

7. Plaintiff is a natural person who, at all times relevant to this action, was a resident of Fair Oaks, California.

8. Defendant is an Arizona limited liability company whose principal office is located at 2450 S. Gilbert Rd, Suite 210, Chandler, AZ 85286.

9. Plaintiff is informed and believes that NEXA Mortgage, LLC does business as NEXA Mortgage CA.

**THE TCPA**

10. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system (“ATDS”); and (3) without the recipient’s prior express consent. 47 U.S.C. § 227(b)(1)(A).

11. The TCPA defines an “automatic telephone dialing system” (“ATDS”) as “equipment that has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1).

12. In an action under the TCPA, a plaintiff must only show that the defendant “called a number assigned to a cellular telephone service using an automatic dialing system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

13. The Federal Communications Commission (“FCC”) is empowered to issue rules and regulations implementing the TCPA. According to the FCC’s findings, calls in violation of the TCPA are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).



14. In 2012, the FCC issued an order tightening the restrictions for automated telemarketing calls, requiring “prior express written consent” for such calls to wireless numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

15. To obtain express written consent for telemarketing calls, a defendant must establish that it secured the plaintiff’s signature in a form that gives the plaintiff a “‘clear and conspicuous disclosure’ of the consequences of providing the requested consent....and having received this information, agrees unambiguously to receive such calls at a telephone number the [plaintiff] designates.” *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

16. The TCPA regulations promulgated by the FCC define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. § 64.1200(f)(12). In determining whether a communication constitutes telemarketing, a court must evaluate the ultimate purpose of the communication. *See Golan v. Veritas Entm’t, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

17. “Neither the TCPA nor its implementing regulations ‘require an explicit mention of a good, product, or service’ where the implication of an improper purpose is ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012)).

18. “‘Telemarketing’ occurs when the context of a call indicates that it was initiated and transmitted to a person for the purpose of promoting property, goods, or services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. § 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at \*49).



19. The FCC has explained that calls motivated in part by the intent to sell property, goods, or services are considered telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to purchase, rent, or invest in property, goods, or services during the call or in the future. *Id.*

20. In other words, offers “that are part of an overall marketing campaign to sell property, goods, or services constitute” telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).

21. If a call is not deemed telemarketing, a defendant must nevertheless demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 (2015) (requiring express consent “for non-telemarketing and non-advertising calls”).

22. Further, the FCC has issued rulings and clarified that consumers are entitled to the same consent-based protections for text messages as they are for calls to wireless numbers. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (The FCC has determined that a text message falls within the meaning of “to make any call” in 47 U.S.C. § 227(b)(1)(A)); *Toney v. Quality Res., Inc.*, 2014 WL 6757978, at \*3 (N.D. Ill. Dec. 1, 2014) (Defendant bears the burden of showing that it obtained Plaintiff’s prior express consent before sending him the text message). (emphasis added).

23. As recently held by the United States Court of Appeals for the Ninth Circuit: “Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA ‘need not allege any additional harm beyond the one Congress has identified.’” *Van Patten v. Vertical Fitness Grp.*, No. 14-55980, 2017

1 U.S. App. LEXIS 1591, at \*12 (9th Cir. May 4, 2016) (quoting *Spokeo, Inc. v.*  
2 *Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis original)).

3 **FACTS**

4 24. On June 6, 2020, Plaintiff purchased a cellular telephone, which had the  
5 ability to send and receive text messages.

6 25. On November 22, 2020, Plaintiff received an unsolicited text message,  
7 which inquired whether Plaintiff or someone Plaintiff knows is in need of a new  
8 home loan. Below is the content of that text message:

9 Good Morning, do you or  
10 someone you know in need of a  
11 New Home Loan?  
12 Please Call Me  
13 Wayne Bright  
14 NEXA Mortgage CA  
15 NMLS 55211  
16 Equal housing opp  
17 Text STOP to end

17 26. Defendant's text messages constitute telemarketing because they  
18 encouraged the future purchase or investment in property, goods, or services, i.e.,  
19 selling a mortgage service.

20 27. Plaintiff received the subject texts within this judicial district and,  
21 therefore, Defendant's violation of the TCPA occurred within this district. Upon  
22 information and belief, Defendant caused other text messages to be sent to  
23 individuals residing within this judicial district.

24 28. At no point in time did Plaintiff provide Defendant with his express  
25 written consent to be contacted using an ATDS.

26 29. Plaintiff is the subscriber of the phone associated with the number that  
27 was messaged and is financially responsible.  
28



30. The impersonal and generic nature of Defendant’s text message, demonstrates that Defendant utilized an ATDS in transmitting the messages. *See Jenkins v. LL Atlanta, LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at \*11 (N.D. Ga. Mar. 9, 2016) (“These assertions, combined with the generic, impersonal nature of the text message advertisements and the use of a short code, support an inference that the text messages were sent using an ATDS.”) (citing *Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1354 (S.D. Fla. 2014) (plaintiff alleged facts sufficient to infer text messages were sent using ATDS; use of a short code and volume of mass messaging alleged would be impractical without use of an ATDS); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding it “plausible” that defendants used an ATDS where messages were advertisements written in an impersonal manner and sent from short code); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1130; *Robbins v. Coca-Cola Co.*, No. 13-CV-132-IEG NLS, 2013 U.S. Dist. LEXIS 72725, 2013 WL 2252646, at \*3 (S.D. Cal. May 22, 2013) (observing that mass messaging would be impracticable without use of an ATDS)).

31. The text message originated from the telephone number (916) 304-1510, a number which is owned and operated by Defendant.

32. In response, Plaintiff texted back “STOP”. Almost immediately, Defendant responded with what appeared to be another automated text stating:

TEXT Mobile Alerts. You are unsubscribed from all Alerts, no more messages will be sent. Text HELP for help or 1-855-220-1344.

33. The immediate response from Defendant containing generic messaging to Plaintiff indicates the use of an ATDS.

34. Defendant’s unsolicited text message caused Plaintiff actual harm, including invasion of his privacy, aggravation, annoyance, intrusion on seclusion,



1 trespass, and conversion. Defendant's text messages also inconvenienced Plaintiff  
2 and caused disruption to his daily life.

3 35. Defendant's unsolicited text messages caused Plaintiff actual harm.  
4 Specifically, Plaintiff confronted Defendant to determine why the unwanted text  
5 messages had sent this message to his daughter's phone.

6 36. Defendant informed Plaintiff that Defendant purchased a list of cell  
7 phone numbers and sent a message to all the numbers it purchased, not knowing who  
8 would receive the messages.

9 37. Defendant's text messages also can slow cell phone performance by  
10 taking up space on the recipient phone's memory. See  
11 <https://www.consumer.ftc.gov/articles/0350-text-message-spam#text> (finding that  
12 spam text messages can slow cell phone performance by taking up phone memory  
13 space).

### 14 **CLASS ALLEGATIONS**

15 38. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23,  
16 on behalf of himself and all others similarly situated.

17 39. Plaintiff brings this case on behalf of a Class defined as follows:

18 No Consent Class: All persons within the United States who  
19 received any solicitation/telemarketing text messages from  
20 Defendant to said person's cellular telephone made through the  
21 use of any automatic telephone dialing system or an artificial or  
22 prerecorded voice and such person had not previously  
23 consented to receiving such calls within the four years prior to  
24 the filing of this Complaint.

25 40. Defendant and its employees or agents are excluded from the Class.  
26 Plaintiff does not know the number of members in the Class but believes the Class  
27 members number in the several thousands, if not more.

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1           **NUMEROSITY**

2           41. Upon information and belief, Defendant has placed automated and/or  
3 prerecorded calls to cellular telephone numbers belonging to thousands of consumers  
4 throughout the United States without their prior express consent. The members of the  
5 Class, therefore, are believed to be so numerous that joinder of all members is  
6 impracticable.

7           42. The exact number and identities of the Class members are unknown at  
8 this time and can only be ascertained through discovery. Identification of the Class  
9 members is a matter capable of ministerial determination from Defendant's call  
10 records.

11           **COMMON QUESTIONS OF LAW AND FACT**

12           43. There are numerous questions of law and fact common to the Class  
13 which predominate over any questions affecting only individual members of the  
14 Class. Among the questions of law and fact common to the Class are:

- 15           i. Whether Defendant sent non-emergency messages to Plaintiff's and  
16 Class members' cellular telephones using an ATDS;  
17           ii. Whether Defendant can meet its burden of showing that it obtained  
18 prior express written consent to send such messages;  
19           iii. Whether Defendant's conduct was knowing and willful;  
20           iv. Whether Defendant is liable for damages, and the amount of such  
21 damages; and  
22           v. Whether Defendant should be enjoined from such conduct in the  
23 future.

24           44. The common questions in this case are capable of having common  
25 answers. If Plaintiff's claim that Defendant routinely transmits text messages to  
26 telephone numbers assigned to cellular telephone services is accurate, Plaintiff and  
27 the Class members will have identical claims capable of being efficiently adjudicated  
28 and administered in this case.

1           **TYPICALITY**

2           45. Plaintiff's claims are typical of the claims of the Class members, as they  
3 are all based on the same factual and legal theories regarding unsolicited text  
4 messages being sent by Defendant to Class members.

5           **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

6           46. Plaintiff is a representative who will fully and adequately assert and  
7 protect the interests of the Class and has retained competent counsel. Accordingly,  
8 Plaintiff is an adequate representative and will fairly and adequately protect the  
9 interests of the Class.

10           **PROCEEDING VIA CLASS ACTIONS IS SUPERIOR AND**  
11           **ADVISABLE**

12           47. A class action is superior to all other available methods for the fair and  
13 efficient adjudication of this lawsuit because individual litigation of the claims of all  
14 members of the Class is economically unfeasible and procedurally impracticable.  
15 While the aggregate damages sustained by the Class are in the millions of dollars, the  
16 individual damages incurred by each member of the Class resulting from Defendant's  
17 wrongful conduct are too small to warrant the expense of individual lawsuits. The  
18 likelihood of individual Class members prosecuting their own separate claims is  
19 remote, and, even if every member of the Class could afford individual litigation, the  
20 court system would be unduly burdened by individual litigation of such cases.

21           48. The prosecution of separate actions by members of the Class would  
22 create a risk of establishing inconsistent rulings and/or incompatible standards of  
23 conduct for Defendant. For example, one court might enjoin Defendant from  
24 performing the challenged acts, whereas another may not. Additionally, individual  
25 actions may be dispositive of the interests of the Class, although certain class  
26 members are not parties to such actions.

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**COUNT I**

**Violations of the TCPA, 47 U.S.C. § 227(b)(1)(A)**

**(On behalf of Plaintiff and the Class)**

49. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

50. It is a violation of the TCPA to make “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ....” 47 U.S.C. § 227(b)(1)(A)(iii).

51. Defendant – or third parties directed by Defendant – used equipment having the capacity to dial numbers without human intervention to make non-emergency telephone calls to the cellular telephones of Plaintiff and the other members of the Class defined below.

52. These calls were made without regard to whether Defendant had first obtained express permission from the called party to make such calls. In fact, Defendant did not have prior express consent to call the cell phones of Plaintiff and the other members of the putative Class when its calls were made.

53. Defendant has, therefore, violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic telephone dialing system to make non-emergency telephone calls to the cell phones of Plaintiff and the other members of the putative Class without their prior express written consent.

54. Defendant knew that it did not have prior express consent to make these calls and knew or should have known that it was using equipment that constituted an automatic telephone dialing system. The violations were therefore willful or knowing.

55. As a result of Defendant’s conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff and the other members of the putative Class were harmed and are

1 each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and  
2 the class are also entitled to an injunction against future calls. *Id.*

3 **COUNT II**

4 **Violation of the TCPA, 47 U.S.C. § 227(b)(1)(C)**

5 56. Plaintiff re-alleges and incorporates paragraphs 1-61 as if fully set forth  
6 herein.

7 57. It is a violation of the TCPA “to use ... [a] device to send ... an  
8 unsolicited advertisement ....” 47 U.S.C. § 227(b)(1)(C).

9 58. The term unsolicited advertisement means “any material advertising the  
10 commercial availability or quality of any property, goods, or services which is  
11 transmitted to any person without that person’s prior express invitation or permission,  
12 in writing or otherwise.” 47 U.S.C. § 227(a)(5).

13 59. Defendant sent Plaintiff and other Class members an unsolicited  
14 advertisement to sign up for a discreet hook up service, and an unsolicited  
15 advertisement to create a free membership.

16 60. These messages were sent without Plaintiff or the other Class member’s  
17 prior express consent.

18 61. Thus, Defendant has violated § 227(b)(1)(C) of the TCPA by using by  
19 sending unsolicited messages to Plaintiff and the other members of the putative Class  
20 without their prior express written consent.

21 62. As a result of Defendant’s conduct and pursuant to § 227(b)(3) of the  
22 TCPA, Plaintiff and the other members of the putative Class were harmed and are  
23 each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and  
24 the class are also entitled to an injunction against future calls. *Id.*

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**COUNT III**

**Knowing and/or Willful Violation of the TCPA, 47 U.S.C. § 227(b)**

**(On Behalf of Plaintiff and the Class)**

63. Plaintiff re-alleges and incorporates paragraphs 1-61 as if fully set forth herein.

64. At all times relevant, Defendant knew or should have known that its conduct as alleged herein violated the TCPA.

65. Defendant knew that it did not have prior express consent to make these calls and knew or should have known that its conduct was a violation of the TCPA.

66. Because Defendant knew or should have known that Plaintiff and Class Members had not given prior express consent to receive its autodialed calls, the Court should treble the amount of statutory damages available to Plaintiff and the other members of the putative Class pursuant to § 227(b)(3) of the TCPA.

67. As a result of Defendant's conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff and the other members of the putative Class were harmed and are each entitled to a minimum of \$1,500.00 in damages for each violation. Plaintiff and the class are also entitled to an injunction against future calls. Id.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff, individually and on behalf of the Class, prays for the following relief:

- a) An order certifying this case as a class action on behalf of the Class as defined above, and appointing Plaintiff as the representative of the Class and counsel as Class Counsel;
- b) An award of actual and statutory damages;
- c) An order declaring that Defendant's actions, as set out above, violate the TCPA;
- d) A declaratory judgement that Defendant's telephone calling equipment constitutes an automatic telephone dialing system under the TCPA;

- 1 e) An injunction requiring Defendant to cease all unsolicited text  
2 messaging activity, and to otherwise protect the interest of the Class;  
3 f) An injunction prohibiting Defendant from using, or contracting the use  
4 of, an automatic telephone dialing system without obtaining, recipient's  
5 consent to receive calls made with such equipment; and  
6 g) Such further and other relief as the Court deems necessary.

7 **JURY DEMAND**

8 68. Plaintiff and Class Members hereby demand a trial by jury.

9  
10 Dated: February 12, 2021

**KAZEROUNI LAW GROUP, APC**

11 By: /s/ Ryan L. McBride  
12 Ryan L. McBride, Esq.  
13 *Attorney for Plaintiff and the*  
14 *Proposed Class*

